STATE OF MICHIGAN

IN THE SUPREME COURT

SUE H. APSEY and ROBERT APSEY, JR.,

Plaintiffs-Appellees
and Cross-Appellants,

vs.

MEMORIAL HOSPITAL, d/b/a MEMORIAL HEALTHCARE CENTER, RUSSELL H. TOBE, D.O., JAMES H. DEERING, D.O., JAMES H. DEERING, D.O., P.C., and SHIAWASSEE RADIOLOGY CONSULTANTS, P.C.,

Defendants-Appellants
and Cross-Appellees.

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No. 129134

Court of Appeals
Docket No. 251110

Shiawassee Circuit Court
Court No. 01-007289-NH

129134
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SUPPLEMENTAL BRIEF *AMICUS CURIAE* OF THE STATE BAR OF MICHIGAN, NEGLIGENCE SECTION

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INTRODUCTION

All of the briefs, both those of the parties and those of the amici, were submitted to this court within a few months of the original Apsey decision. Of course, it is now over a year since that decision first came out. As such, this Court should consider this year of experience, in which Michigan practitioners, out-of-state affiants and court clerks bore the brunt of a stubborn adherence to a horse and buggy statute in the age of the internet. This brief will encapsulate that experience, and raise new constitutional concerns not foreseen by the Apsey panel, the parties, or the amici when they were writing from "ground zero"

Since practitioners have been forced to attempt to provide certification to notarial signatures, it has been learned that 24 states, the District of Columbia and 3 large Michigan counties are either unable or unwilling to comply with the strict requirements of MCL 600.2102. The list is attached below:

Apsey List : Other States and Michigan Counties that will not Certify by the Clerk of the County Court

24 Known states plus DC:

California
Colorado
Connecticut
District of Columbia (no counties)
Florida
Illinois (large counties)
Iowa
Kansas
Louisiana (no counties)
Maine

Massachusetts
Minnesota
Missouri
Montana
Nevada
New Jersey
North Carolina
North Dakota
Oregon
Rhode Island
South Dakota
Texas
Utah
Washington
Wisconsin

List of Michigan Counties that can not comply:

Kent
Kalamazoo
Washetenaw

The following list sets out the modern method for determining if a notary was, in fact, a notary, at the time of notarizing an affidavit:

STATE	CONTACT INFO(WEBSITES or PHONE NUMBERS)
Alabama	Http://www.sos.state.al.us/sosinfo/inquiry.cfm?area=Notaries%20Public
Alaska	907-465-3509-Notary Department
Arizona	Http://www.azsos.gov/scripts/Notary_Search.dll
Arkansas	Http://www.sos.arkansas.gov/corps/notary/
California	916-653-6814-Notary Department
Colorado	303-894-2200-Notary Department
Connecticut	860-509-6100-Notary Department
Delaware	302-739-4111-Notary Department
Florida	Http://notaries.dos.state.fl.us/not001.html
Georgia	Http://www.gsccca.org/search/Notary/search.asp
Hawaii	808-586-1216-Notary Department
Idaho	Http://www.sos.idaho.gov/online/notary/notarySearch.jsp
Illinois	Http://www.cyberdriveillinois.com/IndexWeb/notarystart.html
Indiana	Http://www.ai.org/serv/sos_notary

Iowa	Http://www.sos.state.ia.us/notaries/notary_search.asp
Kansas	785-296-4564-Notary Department
Kentucky	Http://apps.sos.ky.gov/adminservices/notaries/
Louisiana	Http://www.sec.state.la.us/notary-pub/ntring.htm
Maine	Http://portalx.bisoex.state.me.us/pls/sos_bc/bcdev.notaries.search?v_search_t
Maryland	Http://www.sos.state.md.us/Notary/NotarySearch.htm
Massachusett	617-725-4030-Notary Department
Michigan	Http://services.sos.state.mi.us/notarysearch/
Minnesota	Https://notary.sos.state.mn.us/
Mississippi	Http://www.sos.state.ms.us/busserv/notaries/notaries.asp
Missouri	Http://www.sos.mo.gov/notary/notarysearch/notarysearch.aspx
Montana	406-444-5379-Notary Department
Nebraska	402-471-4094-Notary Department
Nevada	775-684-5708-Notary Department
New	603-271-3242- Kathy-Notary Department
New Jersey	609-633-8258--Notary Department
New Mexico	505-827-3600-Notary Department
New York	Http://appsext5.dos.state.ny.us/lcns_public/lic_name_search_frm
North Carolina	919-807-2219--Notary Department
North Dakota	701-328-3665-Notary Department
Ohio	Http://serform.sos.state.oh.us/pls/porthope/dev.rpt_notaryv2.show_parms
Oklahoma	Https://www.sooneraccess.state.ok.us/corp_inquiry/corp_inquiry-
Oregon	Http://www.filinginoregon.com/Oregon/Notaries.htm
Pennsylvania	717-787-5280-Notary Department
Rhone Island	Http://www.corps.state.ri.us/notaries/notaries.htm
South	803-734-2512-Notary Department
South Dakota	Http://www.state.sd.us/applications/ST12ODRS/aspx/frmNotaryViewlist.aspx?c
Tennessee	Http://www.ja.state.tn.us/sos/iets1/ieny/PglenySearch.jsp
Texas	Https://direct.sos.state.tx.us/notaries/NotarySearch.asp
Utah	Http://search.utah.gov/retina/public/basic.do
Vermont	Http://www.sec.state.vt.us/seek/not_seek.htm
Virginia	804-786-2441- press 3
Washington	360-664-1550- press 8
West Virginia	Http://www.wvsos.org/notary/search/index.aspx
Wisconsin	608-266-5594-Notary Department
Wyoming	307-777-7378-Notary Department

H:\Personal WP\Firm Management Forms\Notary search list

This has been the common response in many states when Michigan lawyers approach various notaries and court officials to explain to them what is needed under the Apsey interpretation of 600.2102: "There are so many resources at your disposal to ensure that a particular notary was acting within his or her power when notarizing a document; we cannot or will not act outside our powers at the behest of an antiquated statute that is not in force in our jurisdiction." The reality of the notarial landscape, juxtaposed against the requirements which this state would impose on the courts and notaries of 49 others, suggest that this Court should review the post-Apsey experience, and consider additional reasons why MCL 600.2102 cannot be enforced in the manner suggested by Apsey II.

The first reason, impossibility, is straightforward, and could not have been known prior to the Apsey decisions, thus rendering it an appropriate focus of this court's concern. The other issues are constitutional, and although the standard rule is that constitutional issues not raised below are not to be passed on by a reviewing court, *Butcher v Department of Treasury*, 425 Mich 262; 389 NW2d 412 (1985), where there is a pressing public need for such constitutional determinations, such can be made by this Court in the first instance; see, e.g., *Shavers v Kelley*, 402 Mich 554; 267 NW2d 72 (1978); *Ridenour v Bay County*, 366 Mich 225; 114 NW2d 172 (1962).

I. Impossibility Is a Defense To a Claim Of Noncompliance With a Statute

Impossibility can be an exception to compliance with statutory requirements. The law is pretty straight-forward & well-settled: Michigan courts recognize that, in a civil case, violation of a statute "may rebutted by a showing on the part of the party violating

the statute of an adequate excuse under the facts and circumstances of the case." *Zeni v Anderson*, 397 Mich 117, 129-130; 243 NW2d 270 (1976) (footnotes omitted), citing 2 Restatement of Torts (2d), §288A, pp. 32-33. See *also Klanseck v Anderson Sales & Service, Inc*, 426 Mich 78; 393 NW2d 356 (1986); M Civ JI 12.02. Five possible categories of legally excused violations are found in Restatement §288A and are "not intended to be exclusive", according to Comment a:

> (a) The violation is reasonable because of the actor's incapacity;
> (b) He neither knows nor should know of the occasion for compliance;
> (c) He is unable after reasonable diligence or care to comply;
> (d) He is confronted by an emergency not due to his own misconduct;
> (e) Compliance would involve a greater risk of harm to the actor or to others.

Whether an excuse would be adequate is for the jury to decide. *Massey v Scripter*, 401 Mich 385, 395; 258 NW2d 44 (1977) (tandem bicycle case).

II. MCL 600.2102 is Unconstitutional Under the Interstate Commerce Clause of the United States Constitution, US Const, Art I, § 8, cl 3

US Const, Art I, § 8, cl 3, known as the Commerce Clause of the United States Constitution, provides that Congress has the sole authority to regulate commerce "among the several States." Under this clause, the United States Supreme Court has long held that states are prohibited from passing and enforcing otherwise facially neutral laws that place burdens upon in-state persons or entities engaging in commerce with persons or entities in other states. *Granholm v. Heald*, 544 US 460; 125 S.Ct. 1885; 161 LEd 2d 796 (2005); *Rhodes v. Iowa*, 170 US 412; 18 S.Ct. 664; 42 LEd 1088 (1898). This

prohibition has become commonly known as the "dormant commerce clause." In *Granholm*, the U.S. Supreme Court reiterated the long-standing prohibition against state laws that burden in-state residents from engaging in commerce in other states.

> Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. *Oregon Waste Systems, Inc., v. Department of Environmental Quality of Ore.*, 511 US 93, 99, 114 S.Ct. 1345, 128 Led.2d 13 (1994) [other citations omitted]. This rule is essential to the foundations of the Union.

Granholm, 544 US 472; 125 S.Ct. 1885, 1895 (2005). "State laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity.'" *Id.*, at 476; 125 SCt at 1897; citing to *Philadelphia v. New Jersey*, 437 US 617, 624, 98 SCt 2531, 57 LEd 2d 475 (1978). This prohibition applies "even if the legislation involves matters of legitimate local concern." *Reynolds v. Buchholzer*, 87 F3d 827, 829 (6th Cir. 1996); citing to *Minnesota v. Clover Leaf Creamery Co.*, 449 US 456, 471, 101 SCt 715, 727-728, 66 LEd 2d 659 (1981).

A state law discriminates against interstate commerce when it imposes costs or burdens upon the interstate transaction higher than those imposed upon similar in-state transactions. *Reynolds*, 87 F3d at 830; citing to *Philadelphia*, 437 US at 627, 98 SCt at 2537. It is not necessary for the state to intend to discriminate against interstate commerce for the law to be unconstitutional. A challenged law will face the *per se* rule of invalidity if either the purpose *or effect* of the law is to increase the burdens upon conducting business in others states. *Wyoming v. Oklahoma*, 502 US 437, 112 SCt 789, 800, 117 LEd 2d 1 (1992). The proponent of a law which places increased burdens upon interstate commerce, without placing the same burden on in-state commerce, bears the

burden of proving that there is no reasonable alternative method available to safeguard the local interest. *Id.* MCL 600.2102, and its application in *Apsey*, violates the interstate commerce clause, and its prohibition against any state law that discriminates against interstate commerce.[1]

MCL 600.2102 places additional burdens upon litigants seeking to engage in interstate commerce with out-of-state experts and notaries, and hence discriminates against interstate commerce by its requirement that the submission of affidavits of merit from out-of-state experts must be accomplished through the additional expense and burden of obtaining special certification of the notary's commission and the authenticity of the notary's signature from the clerk of the court for the county out of which the notary is commissioned, while imposing no such burden and accompanying expense upon the use of in-state experts and notaries. The burdens and expenses of complying with MCL 600.2102 are substantial, and in some cases it is impossible to comply with MCL 600.2102. The statue thus burdens the conduct of business in other states, while leaving those conducting business in the home state unaffected. For those states whose county courts will provide such certification, obtaining the certification involves sending the affidavits to the court clerk in that county (which involves postage fees and the cost of lost staff time), payment of the certification fee which can cost upwards of $25.00 per affidavit certified in Oklahoma and New Jersey (not including rush fees), payment of return postage or courier fees and additional waiting time needed to obtain the certifications for filing with the complaint and affidavit. When time is short, it is

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[1] This issue was never raised in *Apsey*, and as such, *Apsey* does not control this issue. See *Derderian v. Genesis Health Care Systems,* 263 Mich App 364; 689 NW2d

necessary to have a local notary or courier service obtain the certification to avoid the delay incurred in having the expert send the affidavit back to Michigan, so that it can be sent back out of Michigan and to the appropriate county court, and then sent back to Michigan in certified form. This can cost upwards of $150.00 just to obtain the certification.

Obtaining the certification creates significant burdens in not only time, but also money. Furthermore, MCL 600.2102 requires the certification to come from the court for the county out of which the notary is commissioned. This requirement makes it impossible to obtain certifications, and hence engage in commerce with experts and notaries in those states that do not commission notaries out of county courts, or those which do not provide the certifications out of the county courts (such as Michigan). The vast majority of states commission out of and/or provide certifications out of county clerk offices (not court clerk offices), Lt. Governor offices, or the Secretary of State offices.[2] Whereas MCL 600.2102 requires such special certification only as to out-of-state affiants and notaries, with all its attending costs in terms of money and time, it does not impose similar burdens and expenses on in-state affiants and notaries, and therefore discriminates against interstate commerce. Furthermore, there are reasonable alternative methods of protecting any interest Michigan has in ensuring that the notarial act is legitimate and not fraudulent. For example, Michigan could, and does allow an opposing litigant to

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145 (2004); and *Rahman v. Detroit Board of Educ.*, 245 Mich App 103; 627 NW2d 41 (2001).

[2] Such states include: California, Colorado, Connecticut, the District of Columbia, Florida, Illinois, Iowa, Kansas, Louisiana (which does not have counties, but rather "parishes"), Maine, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Jersey, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Texas, Utah, Washington, Wisconsin.

investigate via telephone, fax machine and the internet whether the notary was duly commissioned, if that litigant wishes to challenge the legitimacy of the notarial act. Most important perhaps is the fact that Michigan abdicated its interest in authenticating out-of-state notarial acts by enactment of the URAA, which demonstrates that there is no legitimate local interest currently justifying the burdens placed upon interstate commerce by MCL 600.2102. As such, MCL 600.2102 violates the interstate commerce clause. Although it might have been defensible in 1846, today's practice renders the Apsey II decision unconstitutional as applied.

III. MCL 600.2102 Violates the Full Faith & Credit Clause of the U.S. Constitution

The full faith and credit clause of the United States Constitution requires that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. US Const, art IV, § 1. Notarial acts are public acts by public officers to which full faith and credit must be afforded under the US Const, art IV, § 1. *Pierce v. Indseth*, 106 US 546; 1 SCt 418; 27 LEd 254(1883); *Bickett v. Knight*, 169 NC 333; 85 SE 418 (1915); and *Nicholson v. Eureka Lumber Co.*, 160 NC 33, 75 SE 730 (1912). Any refusal to fully acknowledge and give full effect to the notarial acts on plaintiff's affidavits of merit, which bear the notaries' respective seals, is a refusal to give full faith and credit to the notarial act in violation of the full faith and credit clause of the U.S. Constitution. US Const, art IV, § 1. MCL 600.2102, on its face and as applied in *Apsey,* does not afford full faith and credit to the notarial act since it requires the additional certification, a type of certification that is not required in order to give full faith and credit to other public acts of other states, such as state court orders, subpoenas,

and judgments. As such, MCL 600.2102 is unconstitutional as violative of the full faith and credit clause of the U.S. Constitution. US Const, art IV, § 1.

Federal Courts do not require Notarization of affidavits at all. They use a far superior system; one that conflicts with that 'adopted' in Michigan by Apsey II: 28 USC §1746 provides as follows:

> "Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certification, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and affect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:
> (1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).
> (Signature)".
> (2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).
> (Signature)".

The federal system is far superior to the MI system in preventing fraud or misrepresentations. A notary only attests that the person is who they say they are. Under the federal system the affiant subjects themselves to perjury penalties. The US attorney has prosecuted many persons under this statute. The same cannot be said for certification

of notaries, which does nothing to accomplish the goals of the medical malpractice statutes.

The Michigan statute conflicts with the Federal process for certification of notaries. The Apsey II panel, in placing the antiquated provisions of MCL 600.2102 in an exalted position, failed to recognize that the federal government has set into place a process for certification of notaries. The procedure came into place in 1981. Since 1981 each state in the US has a designated state official that certifies notaries.

The Michigan system ignores this process and requires certification by a Court Clerk. This was fine in 1846 when the statute was passed but is now grossly outdated and serves as an embarrassment to this state where national and international commerce is vitally to the state's economy. More importantly, it attempts to supercede a national system of recognition of notarial acts with an outdated, repudiated statute, with no authority to do so.

The Court should note that each state in the United States selects the designated state official to certify a notary signature, most commonly through the Secretary of State. Significantly, there is not a single state which follows the procedure mandated by MCLA 600.2102(4). As such, this statute fails to give full faith and credit to the procedures in place for certification of a notary signature in every other state in the United States. This is not constitutionally permissible. Full faith and credit must be given to another state's procedure.

Further, when considering the full faith and credit of the statute the court must be reminded that MCL 600.2102, while amended in 1963, is derived from the public laws of 1846. As such, the purpose of the notary statute and the requirements of an 1846 statute

must be looked at in light of case law interpreting similar acts at the time. The United States Supreme Court in 1882 addressed a similar statue requiring a seal in the then District of Minnesota. *Pierce v Indseth*, 106 US 546; 1 SCt 418; 27 LEd (1882). In addressing full faith and credit, the U.S. Supreme Court specifically held that full faith and credit must be given to an affidavit from Norway that did not contain the proper seal despite such a state requirement. The Court stated:

> Here there is no difficulty in identifying the seal. The impression which is circular in form has within its rims the words Notarial Seal, Christiania. Besides the court will take judicial notice of the seals of notaries public, for they are officers recognized by the commercial law of the world. We thus recognize the seal to the document in question as that of a notary of Norway, and as such authenticating the certificate of protest and entitling it to full faith and credit. Id.

Thus, the Supreme Court of the United States recognized - even in the 19th century - that the failure to provide a seal in an otherwise valid affidavit is at most a technical defect, which did not preclude it from being given full faith and credit.

This Court should also consider *Smith v Gale*, 144 U.S. 509; 12 SCt 674; 36 LEd 521 (1882). Again in discussing a technical defect having not been meet under the Dakota Code of Civil Procedure, the court stated:

> The record of the instrument is really but secondary evidence, although by statue it is made primary; and it would be sticking in the bark to hold that the original instrument, having the official seal of the notary to the acknowledgment should be defeated by the fact that with recording of such instrument the seal was accidentally omitted. The record of such instrument might thereby become inadmissible as a substitute for the original, but so slight an omission as this in the record ought not to defeat the original instrument as evidence.
>
> * * *

> It would be a singular perversion of the principles of natural justice if, with a perfect deed before the court and a record which lacked only a scrawl or other symbol of a seal, neither could be admitted in evidence by reason of the fact that they did not exactly correspond, or, speak more accurately, were not exactly identical, especially when the record could be amended on the spot by adding the representation of a seal. The court should not permit such a plain defeat of justice as this would be, by an obstinate adherence to a statutory requirement. Id.

As the ancient practice of having a notary read matters into evidence at the time of trial has long ago been abandoned and replaced by modern day procedures, more in keeping with the electronic, instantaneous needs of business and commerce, this singularly antiquated statute must likewise be abandoned. More precisely, its provisions are clearly repugnant to the Full Faith and Credit Clause and serve no purpose to the State, and, therefore, must be struck down as unconstitutional.

CONCLUSION

The Apsey II panel did not foresee the impossibility of carrying out its mandate in the 21st century world. It did not, and could not have, realized that the all 50 states - including Michigan - have long since conceded that today's global marketplace demands instantaneous methods of verifying the legitimacy of a person's signature through the use of notarial acts. Literally no one - in this state or elsewhere - demands a physical seal on a physical ink and paper document, placed there by a court clerk, prior to acknowledging the legitimacy of a necessary signature. Michigan doesn't. Neither do any of the other 50 states, or any other country in the world.

In fact, Michigan practice as to acknowledging the legitimacy of signatures through notarial acts is now governed by a distinct statute, passed more recently than 600.2102; namely, the URAA. This later-enacted statute also governs national practice. Constitutionally, the proper notarial acts carried out through the valid procedures of other states must be given Full Faith and Credit in Michigan courts; the failure to do so places an impermissible burden on commerce in the other states, as compared to Michigan.

These reasons, now pressed home in the year-long experience under Apsey II, should be taken into account by this Court in determining the resolution of the issues set out in the appeals currently pending in front of it. These reasons provide further justification for this Court to rule that Michigan has already joined the rest of the world in the manner in which signatures are legitimized through notarial acts, and to further repudiate the Apsey II panel's attempt to drag the state, and its businesses and commerce, back into the 19th century.

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